

Learning How to Stand on Its Own: Will the Supreme Court's Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?

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Smith v. City of Jackson put to rest the oft-debated question: Are disparate impact claims recognized under the ADEA? In answering this question in the affirmative, the Supreme Court definitively settled the issue. However, the Court also indicated that, while disparate impact claims are available, employers need only reveal a reasonable employment goal as a defense, as first outlined in Wards Cove v. Antonio. Although Title VII proved to be vitally important to the Court in deciding Smith, the decision may be the first step toward separating the ADEA from Title VII. By applying the Wards Cove standard and beginning to distinguish Title VII from the ADEA, the Supreme Court may have saved employers from increased litigation in the form of age-based hostile work environment claims—a type of claim just beginning to emerge—and may have reduced the claims available when reductions in force occur.

I. INTRODUCTION

The impact of age discrimination in the workplace has often been debated. Compare, for example, this following view: “Our findings indicate that all too often older job seekers face barriers that are totally unrelated to their ability to do the job”;¹ with this one: “Yet no evidence exists of widespread discrimination against these [older] workers.”²

Theoretically, age discrimination should not exist in the workplace—we all grow older. Most workers will, at some point, reach age forty. At that point, American workers enter the protected class defined by the Age

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¹ KERRY SEGRAVE, AGE DISCRIMINATION BY EMPLOYERS 152 (2001) (quoting remarks made in 1994 by Claudia Withers, who was then Director of the Fair Employment Council of Greater Washington).

² *Id.* at 157 (quoting Gary S. Becker, *What Keeps Older Workers off the Job Rolls*, BUSINESS WEEK, Mar. 19, 1990, at 18).

Discrimination in Employment Act (ADEA).³ One would hope that discrimination on the basis of age would not exist in our society. It makes little sense, analytically, for older workers to be discriminated against, as we would all hope that in our "old" age, others would not discriminate against us. Yet in spite of this, age discrimination still exists in today's workplace.

Nor is the problem of age discrimination new. "As far back as 1866 witnesses testified before a special Massachusetts commission that woodcarvers and cabinet workers were economically old after the age of 40."⁴ Colorado passed a law dealing with age discrimination in discharge procedures in 1903 but it, like many other early laws, was not enforced.⁵ Nearly 100 years passed between those early testimonies and the passage of a federal law addressing age discrimination in employment.

While the ADEA finally provided federal laws to protect older workers, the extent of that protection is an oft-debated topic.⁶ The ADEA certainly covers cases of intentional discrimination, so-called "disparate treatment" cases. Disparate treatment cases involve direct acts of discrimination by employers on the basis of age. This claim is universally accepted and can be brought in any court in the United States.

Contrary to the universal acceptance of disparate treatment cases, the status of disparate impact claims had, until recently, remained unclear. A disparate impact claim alleges that an employer's policy, though facially neutral, has an adverse impact on an older employee.⁷ Disparate impact claims were first recognized in *Griggs v. Duke Power Co.*, a case brought under Title VII of the Civil Rights Act of 1964.⁸ In *Griggs*, the Supreme Court struck down an employer's policy which required employees to hold a

³ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2004). The section of the Act that designates individuals who are at least forty years of age as a protected class is contained in 29 U.S.C. § 361(a) (2004).

⁴ SEGRAVE, *supra* note 1, at 4.

⁵ *Id.*

⁶ See, for example, the debate on disparate impact. See *infra* notes 36-96 and accompanying text.

⁷ Disparate impact can be more fully defined as "[t]he adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity. Discriminatory intent is irrelevant in a disparate-impact claim." BLACK'S LAW DICTIONARY 504 (8th ed. 2004).

⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."). Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

high school diploma.⁹ The Court declared that the policy had a disparate impact on African American workers who, because of historic discrimination, generally had been denied access to a high school diploma.¹⁰ This decision marked the beginning of the disparate impact claim.

While disparate impact claims are accepted in Title VII jurisprudence, the availability of such claims under the ADEA only recently became clear. Until early 2005, there was a split in the federal circuits regarding the availability of such claims. The First, Fifth, Seventh, Tenth, and Eleventh Circuits did not recognize disparate impact causes of action under the ADEA,¹¹ while the Second, Eighth, and Ninth Circuits all permitted such claims.¹² Two other circuits, the D.C. and Sixth Circuits, had remained ambivalent about the availability of the claim.¹³

However, the Supreme Court answered the question with its March 2005 decision in *Smith v. City of Jackson*.¹⁴ The Supreme Court, after considering arguments advanced by the parties and numerous amici, held that disparate impact claims are recognized under the ADEA. However, the Court held ADEA disparate impact plaintiffs to a higher standard of proof than Title VII

⁹ *Griggs*, 401 U.S. at 432.

¹⁰ *Id.* at 430.

¹¹ See, e.g., *Mullin v. Raytheon Co.*, 164 F.3d 696, 696 (1st Cir. 1999); *Smith v. City of Jackson*, 351 F.3d 183, 184 (5th Cir. 2003); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1078 (7th Cir. 1994); *Hiatt v. Union Pacific R.R. Co.*, 65 F.3d 838, 842 (10th Cir. 1995); *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1322 (11th Cir. 2001), *cert. granted*, 534 U.S. 1054 (2001), and *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002). The Third Circuit has also expressed doubts about the availability of disparate impact claims under the ADEA. See *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995). District courts in both the Fourth and D.C. Circuits have also refused to recognize such claims under the ADEA. See *Fobian v. Storage Tech. Corp.*, 959 F. Supp. 742, 746–47 (E.D. Va. 1997), *aff'd*, 217 F.3d 838, 838 (4th Cir. 2000); *Evans v. Atwood*, 38 F. Supp. 2d 25, 25 (D.D.C. 1999). However, it should be noted that the D.C. Circuit never reached a conclusive stance on the availability of disparate impact claims under the ADEA. See *infra* note 13 and accompanying text.

¹² See, e.g., *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 56 (2d Cir. 2004); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000).

¹³ See, e.g., *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 137–40 (6th Cir. 1995); *Koger v. Reno*, 98 F.3d 631, 639 (D.C. Cir. 1996).

¹⁴ *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). This was not the first time the Court contemplated the issue. The Court had granted certiorari to *Adams v. Florida Power Co.* in 2002—a case which would have also answered the question—but dismissed the case as certiorari improvidently granted after hearing oral arguments. See *Adams v. Florida Power Co.*, 535 U.S. 228 (2002).

disparate impact plaintiffs.¹⁵ With the newly announced opinion from the Supreme Court, it becomes necessary to examine what impact the Court's decision may have. The Court's endorsement of disparate impact claims under the ADEA may create a flood of litigation in the courts. Allowing disparate impact claims may expose employers to greater liability—first in the form of hostile work environment claims, claims that, although not widely recognized now, may grow; and second in the form of disparate impact claims when employers undertake reductions in force.

In answering the disparate impact question, the Court also answered two other questions: To what extent should the ADEA continue to be treated like Title VII, and to what extent should the ADEA be recognized as an independent area? Courts have routinely turned to Title VII when answering questions concerning the substance and procedure of the ADEA.¹⁶ The analysis of the Court in *Smith v. City of Jackson* may finally serve as the beginning step in distinguishing whether the ADEA will stand on its own or continue to follow in the footsteps of other anti-discrimination statutes.

This Note examines the history of the ADEA and the historical debate about the viability of disparate impact claims brought under the ADEA. With this background in mind, this Note will then discuss the likely implications of the Court's decision. Part II includes an examination of the evolution of the ADEA and the arguments both for and against the recognition of disparate impact claims under the Act. Part II also gives the details of the *Smith* case. Part III examines how the Court's recognition of disparate impact claims may open up other courts to new lawsuits of the following two types: (1) lawsuits based on a new ADEA claim—hostile work environment claims, and (2) discrimination lawsuits based on disparate impact in cases of an employer's reduction in force. This potential opening for new litigation may cause immense difficulties for employers and increase the amount of age discrimination litigation in the courts. As a result, this Note urges courts to

¹⁵ See *Smith*, 125 S. Ct. at 1538.

¹⁶ See generally Daniel P. O'Meara, *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*, in LABOR RELATIONS AND PUBLIC POLICY SERIES NO. 33, at 88 (1989) (discussing the manner in which both the Supreme Court and lower courts have often applied Title VII case law and interpretations to the ADEA). See, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (interpreting § 14(b) of the ADEA by reference to § 706(c) of Title VII); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 (1985) (interpreting the ADEA's bona fide occupational qualification clause in light of the similar exception contained in Title VII); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120–21 (1985) (denial of privileges cases under the ADEA applied similarly to the cases under Title VII). Interestingly, the Supreme Court, in the *Smith* opinion, cited the above examples as proof of the continued relationship between the ADEA and Title VII. See *Smith*, 125 S. Ct. at 1541 n.4.

narrowly interpret the ADEA in order to protect both employers and the dockets of the courts.

II. AN INTRODUCTION TO THE ARGUMENTS SURROUNDING THE ADEA AND DISPARATE IMPACT CLAIMS

The problem of age discrimination was known well before 1967, when the ADEA was passed by Congress. As early as 1903, states were legislating on the issue.¹⁷ As of 1965, twenty states had passed age discrimination legislation.¹⁸ However, the federal government was slower to take action. The legislative history evidences the impetus for the ADEA and feeds the debate as to whether disparate impact causes of action exist under the ADEA.

A. History of the ADEA

The Age Discrimination in Employment Act of 1967 was not the first of Congress's attempts to eliminate age discrimination. The first significant attempt was in 1962,¹⁹ when the Equal Employment Opportunity Act of 1962 emerged from the House Education and Labor Committee.²⁰ That Act, which never emerged from the House Rules Committee, would have prohibited employment discrimination on the basis of age, race, color, national origin, or ancestry.²¹ The second major attempt came in the congressional debates surrounding the Civil Rights Act of 1964, when Congress considered adding age to the list of prohibited bases for discrimination.²² This amendment, however, was never adopted into law.²³

¹⁷ Colorado was the first state to act, passing legislation in 1903. See SEGRAVE, *supra* note 1, at 4.

¹⁸ *Id.* at 138.

¹⁹ Although Congress did not take up the cause of age discrimination until the early 1960s, the problem had surfaced years before. The problems of middle-aged employees had been addressed both by individuals and states in the years prior to Congress's actions. For a more complete history of the evolution of age discrimination, see SEGRAVE, *supra* note 1.

²⁰ H.R. REP. NO. 87-1370, at 1 (1962).

²¹ See 110 CONG. REC. 2, 2599 (1964) (remarks of Rep. Pucinski).

²² The amendment was introduced by Senator Smathers of Florida. See 110 CONG. REC. 8, 9911 (1964) (remarks of Sen. Smathers). As he introduced the amendment, the Senator noted that he still opposed the bill, but considered the amendment an improvement. *Id.*

²³ Various reasons were offered for the exclusion of age from the prohibitions of Title VII. See, e.g., 110 CONG. REC. 2, 2596 (1964) (remarks of Rep. Celler) (claiming insufficient information was available to legislate on the topic); 110 CONG. REC. 2, 2599

The Civil Rights Act of 1964 did, however, require the Secretary of Labor to study the problem of age discrimination in the workplace.²⁴ This report, entitled *The Older American Worker: Age Discrimination in Employment*, was presented to Congress by Secretary of Labor W. Willard Wirtz in June 1965.²⁵ The report surfaces on both sides of the debate over the viability of disparate impact claims brought under the ADEA. In examining the problem of age discrimination, the report focused on arbitrary age discrimination, finding "no significant evidence" of the intolerance seen in cases involving race, religion, national origin, or color.²⁶ This report ultimately served as the impetus for the ADEA. Interestingly enough, the report also served an important role in the disparate impact debate.²⁷

From 1965 to 1966 there was no significant progress in the recognition and elimination of age discrimination.²⁸ In 1967, Secretary Wirtz submitted a bill to Congress entitled the Age Discrimination in Employment Act of

(1964) (remarks of Rep. Goodell) (finding that Title VII was not designed to include age). Interestingly, age was proposed as an addition to the Civil Rights Act of 1964 by opponents who hoped to make the Act so broad and unwieldy as to be ineffective. O'Meara, *supra* note 16, at 11–12. Recognizing the tactics of the opposition, supporters of the Civil Rights Act did not support the addition of age. See 110 CONG. REC. 2, 2598 (1964) (remarks of Rep. Roosevelt) (noting that restraint was required to help with the passage and effectiveness of the bill).

²⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265.

The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

Id.

²⁵ SEC'Y OF LABOR, U.S. DEP'T OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT* (1965), *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (No. 03-1160), available at 2004 WL 2289230 at jt. app. *32 [hereinafter *THE OLDER AMERICAN WORKER*].

²⁶ *Id.* at *43.

²⁷ This report is also relied on extensively by the majority in *Smith*. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1540 (2005).

²⁸ Congress considered an amendment to the Fair Labor Standards Act (FLSA) that, among other changes, would have outlawed age discrimination; however, this amendment was originally rejected by the Senate Committee on Labor and Public Welfare and, after the amendment was successfully added on the floor, it was eliminated in conference. See O'Meara, *supra* note 16, at 13–14. The final amendments to the FLSA did, however, require the Secretary of Labor to submit specific recommendations to Congress. See Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830, 845 (1966).

1967.²⁹ The Secretary's submission ultimately provided the basis for the ADEA as passed by Congress. In fact, "there was no significant opposition to [the bill] in Congress" and few people showed great concern over the details of the bill.³⁰ Likewise, little attention was given to the bill by the news outlets.³¹ Many anticipated that few claims would be filed under the new law, thus it attracted little attention.³² However, these early estimates proved to be grossly inadequate as the number of charges filed under the ADEA quickly grew to more than 20,000 per year.³³ Since its passage in 1967, the ADEA has been amended several times.³⁴ However, none of the amendments

²⁹ See 113 CONG. REC. 1, 1377 (1967).

³⁰ O'Meara, *supra* note 16, at 14.

³¹ *Id.*

³² Early predictions were that no more than 1000 charges would be filed per year. See *Age Discrimination in Employment: Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 90th Cong. 46 (1967).

³³ The number of charges filed quickly grew from 1031 in 1969 to 5374 in 1979, a mere ten years later. See O'Meara, *supra* note 16, at 30, Table I-6. The number of cases rose rapidly from 1979 to 1985, with nearly 25,000 charges filed in 1985. *Id.* For a discussion of the increase in the number of charges, see O'Meara, *supra* note 16, at 29-33.

³⁴ The 1974 amendment included federal employees and decreased the minimum number of employees required for a business to be covered from twenty-five to twenty. Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 74-76 (1974). The amendment of 1978 (1) changed the employee benefit plan defense, (2) increased the upper age cap from sixty-five to seventy, (3) outlawed mandatory retirement because of age for most of the federal government, (4) changed many procedural aspects of the ADEA, and (5) codified the right to jury under the ADEA pronounced by the court in *Lorillard v. Pons*, 434 U.S. 575, 585 (1978). Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978).

In 1984, the ADEA was amended once again as part of the Older Americans Act Amendments of 1984. See Older Americans Act Amendments of 1984, Pub. L. No. 98-459, §§ 802-03, 98 Stat. 1767, 1792-93 (1984). The 1984 amendment accomplished two things: (1) it extended coverage to Americans who were employed overseas by American firms, and (2) it raised the minimum annual pension to which an employee must be entitled for mandatory retirement. *Id.* at 1792. Congress acted again two years later, passing the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986). The amendment altered some of the provisions for firefighters, police officers, and prison guards, as well as for tenured faculty and people subject to collective bargaining agreements. *Id.* at 3342-45. More importantly, this amendment removed the upper limit of the protected age group (which was previously set at seventy) and eliminated mandatory retirement based on age. *Id.* The ADEA was also amended in 1991 as part of the Civil Rights Act of 1991. See *infra* note 122 and accompanying text. Provisions of the ADEA involving employee benefit plans and

considered or passed by Congress has dealt directly with the viability of disparate impact claims under the ADEA.³⁵ The lack of congressional action is one of the many factors that has been discussed at length in the debate over whether courts should recognize disparate impact claims.

B. *The Raging Debate*

The status of disparate impact claims under the ADEA had been debated for well over a decade without a clear answer.³⁶ However, the agencies charged with enforcing the ADEA have always indicated that such claims are recognizable under the Act.³⁷ Both the Secretary of Labor, the party originally charged with enforcement, and the Equal Employment Opportunity Commission (EEOC) have concluded for years that disparate impact claims are viable.³⁸ Initially, the majority of courts also adopted this position.³⁹ However, after the Supreme Court case of *Hazen Paper Co. v. Biggins*,⁴⁰ the positions of the lower courts started to shift. The Second, Eighth, and Ninth Circuits, relying largely on pre-*Hazen Paper* precedent,

statutes of limitations were also amended at various times; however, for purposes of this Note, these amendments are not relevant. See O'Meara, *supra* note 16, at 19.

³⁵ See *supra* note 34; see also *infra* notes 56–57 and accompanying text.

³⁶ Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267, 270–71 (1995).

³⁷ *Contra* Smith v. City of Jackson, 125 S. Ct. 1536, 1549 (2005) (O'Connor, J., concurring in judgment).

³⁸ See Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981); Age Discrimination in Employment, 33 Fed. Reg. 9172, 9173 (June 21, 1968); Age Discrimination in Employment, 34 Fed. Reg. 322, 322–23 (Jan. 9, 1963) (This section notes that employee testing will be carefully scrutinized to ensure that the test specifically relates to the job requirements, is fair and reasonable, and does not discriminate on the basis of age. Testing in particular will be carefully examined to ensure that the test itself is not unfair to older individuals who may not be as test savvy as younger individuals, thus indicating that an otherwise fair test may still violate the Act if it has an adverse impact on the workers protected by the ADEA.).

³⁹ See 8 EMP. COORD. EMPLOYMENT PRACTICES § 107:12, July 2005, available at EMPC EMPLOYMENT § 107:12 (Westlaw) [hereinafter EMP. COORD. § 107:12] (The courts initially accepted the disparate impact claim theory based on the similarity in language, structure, purpose, and substantive provisions of the ADEA and Title VII. Other courts applied it or allowed it to be applied without announcing a basis for its validity.); Brief of the Petitioners at 10, Smith v. City of Jackson, 125 S. Ct. 1536 (2005) (No. 03-1160), available at 2004 WL 1369172 (noting that claims based on the disparate impact theory were “uniformly recognized by the courts of appeals until 1993”) [hereinafter Brief of the Petitioners].

⁴⁰ *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

continued to allow disparate impact claims.⁴¹ However, the First, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits all refused to recognize the disparate impact cause of action under the ADEA in the years following the *Hazen Paper* decision.⁴²

Both sides of the debate turn to the statutory construction of the ADEA, the legislative history of the Act, and the general policies concerning the disparate impact theory. However, courts reviewing the same evidence have reached contradictory conclusions. The following discussion seeks to briefly outline the main arguments presented by both sides of the debate and relied on in lower courts prior to the Supreme Court's recent decision in *Smith*.

1. *The Pro-Disparate Impact Side*

Prior to *Smith*, the threshold argument for the pro-disparate impact debate was to clarify that the debate was still open and that the Supreme Court had not decided the issue.⁴³ This argument was based on the *Hazen Paper* decision, the same decision that many in the other camp used to argue that such claims are not cognizable. In *Hazen Paper*, the Supreme Court noted that it had "never decided whether a disparate impact theory of liability is available under the ADEA, and [it] need not do so here."⁴⁴ Thus, the general backlash and retreat from the majority position of the pre-*Hazen Paper* years may be unfounded and not a good platform on which to base an opinion.

The relationship (or lack thereof) between *Hazen Paper* and disparate impact claims, however, is not that simple. While *Hazen Paper* did not specifically decide whether disparate impact claims are available under the ADEA, the Court did announce that disparate treatment claims, rather than disparate impact claims, "capture[] the essence of what Congress sought to prohibit in the ADEA."⁴⁵ Proponents of disparate impact claims noted that "'the essence' is not the same thing as 'the entirety,'"⁴⁶ and that similar

⁴¹ EMP. COORD. § 107:12, *supra* note 39.

⁴² See *id.* The First Circuit, prior to the *Hazen Paper* decision, had allowed disparate impact cases. *Id.* District courts in both the Fourth and the D.C. Circuits have also refused to recognize the availability of disparate impact claims under the ADEA. *Id.*

⁴³ In fact, Justice Stevens's plurality opinion tackled this question, noting that "[i]n sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs*." *Smith v. City of Jackson* 125 S. Ct. 1536, 1543 (2005) (plurality opinion).

⁴⁴ *Hazen Paper*, 507 U.S. at 610 (citation omitted).

⁴⁵ *Id.* at 610.

⁴⁶ Brief of the Petitioners, *supra* note 39, at 27.

statements were made by the Court regarding the essence of Title VII,⁴⁷ yet disparate impact claims are still allowed under Title VII.⁴⁸

Having established that, at a minimum, the Court's decision in *Hazen Paper* did not automatically preclude disparate impact claims, the argument in favor of such claims almost universally turned to a discussion of the legislative histories and similarities of Title VII and the ADEA. An examination of the substantive text of the two laws showcases the similarities:

Title VII

"[T]o limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."⁴⁹

The ADEA

"[T]o limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."⁵⁰

When the Secretary of Labor drafted a proposed bill for Congress to consider—the bill that later became the ADEA—Title VII had already been passed as a part of the Civil Rights Act of 1964.⁵¹ The language similarity was not coincidental as "the prohibitions of the ADEA were derived *in haec verba* from Title VII."⁵² The above language of Title VII was heavily relied upon by the Court in creating the disparate impact cause of action.⁵³ Courts recognizing the availability of disparate impact claims under the ADEA

⁴⁷ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

⁴⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁴⁹ 42 U.S.C. § 2000e-2(a)(2) (2000).

⁵⁰ 29 U.S.C. § 623(a)(2) (2000).

⁵¹ See *supra* notes 19–34 and accompanying text.

⁵² *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

⁵³ See *Griggs*, 401 U.S. at 429, 432 (relying on § 703(a)(2), the Court noted that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute" and the goal of the section was to address "the consequences of employment practices, not simply the motivation.").

pointed to the similarity in language between Title VII and the ADEA and the Court's reliance upon the similar text in *Griggs* as the basis for allowing plaintiffs to proceed with their claims.⁵⁴ Importing disparate impact analysis from Title VII to the ADEA will not be the first time the Court has imported a meaning from Title VII to the ADEA. In *Trans World Airlines v. Thurston*, the Court applied a substantive legal rule from Title VII to the ADEA.⁵⁵

There is another important link between the ADEA and Title VII. Title VII was amended in 1991 to expressly include the availability of disparate impact claims under the Act.⁵⁶ In this amendment, Congress also intended

⁵⁴ See, e.g., *Geller v. Markham*, 635 F.2d 1027, 1031–32 (2d Cir. 1980); *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 690 (8th Cir. 1983); *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (9th Cir. 1981).

⁵⁵ *Trans World Airlines v. Thurston*, 469 U.S. 111, 120–21 (1985) (citing *Hishon v. King & Spaulding*, 467 U.S. 69 (1984)). The imported rule said that even when employers are not required to give out a benefit, they cannot selectively offer such a benefit in a manner that is discriminatory. *Id.* at 121. See also *supra* note 16.

⁵⁶ Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1071 (1991). The purpose of this amendment to Title VII was, among other reasons, to specifically “confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title [sic] VII of the Civil Rights Act of 1964.” *Id.* Congress was motivated to act by the Court’s decision in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). The Court’s decision in that case significantly raised the burden on Title VII disparate impact plaintiffs by requiring more than a simple statistical disparity in the workforce. *Wards Cove*, 490 U.S. at 656–57. First, in establishing a *prima facie* case, the correct comparison is the racial composition of the jobs in question and the pool of qualified applicants. JOSEPH E. KALET, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 73 (2d ed. 1990). Further, the plaintiff “must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.” *Wards Cove*, 490 U.S. at 657. The Court also overruled all cases “requiring an employer to show that the challenged practice was ‘essential’ or ‘indispensable’ to the employer’s business, because that degree of scrutiny would be almost impossible for most employers to meet.” KALET, *supra*, at 79. These changes made it much more difficult for an employee to support his or her claim and simultaneously made it easier for employers to defend Title VII disparate impact claims. *Id.* at 87. While the employer has the burden of producing evidence of a business justification after the plaintiff has proven a *prima facie* case, the *Wards Cove* Court also held that the plaintiff held the ultimate burden of persuasion. See Ernest F. Lidge III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1, 27 (2005). Many feared that the Supreme Court was attempting to eliminate disparate impact claims by placing such a heavy burden on the plaintiff. Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 290–92 (1993) (describing the “firestorm” that the *Wards Cove* decision created). As a result, Congress codified the right to disparate impact claims into Title VII. Lidge, *supra*, at 27–29. The reasoning behind *Wards Cove* once again became significant in *Smith*, as the Supreme

for the disparate impact protection to extend to antidiscrimination laws based upon Title VII.⁵⁷ Proponents, therefore, argued that because the ADEA was clearly based upon the language of Title VII, the disparate impact theory of liability must also extend to claims brought under the ADEA.⁵⁸ Although opponents pointed out that Congress specifically amended Title VII but failed to directly amend the ADEA, courts have been cautioned against reading into legislative silence.⁵⁹

Additionally, courts also noted the similar purposes behind the ADEA and Title VII. Title VII sought to eliminate discrimination in the workplace;⁶⁰ the ADEA certainly shares a similar purpose. Specifically, Congress articulated three purposes in passing the ADEA: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁶¹ The Court used the purpose of Title VII to support the *Griggs* decision.⁶² If the purpose of eliminating discrimination in the race context lent support to the use of disparate impact analysis, then supporters argued that the similar purpose of the ADEA in the age context should likewise provide support for disparate impact analysis.

Court determined that the proper analysis under the ADEA for disparate impact claims is the scheme outlined in *Wards Cove*. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1545 (2005).

⁵⁷ EMP. COORD. § 107:12, *supra* note 39 (explaining that Congress meant the disparate impact cause of action "to apply to antidiscrimination laws which have been modeled after and interpreted consistently with Title VII"). See also H.R. REP. NO. 102-40, pt. 2, at 4 (1991).

⁵⁸ The Supreme Court first noted the similarity in substantive provisions between Title VII and the ADEA, noting that the ADEA provisions were derived *in haec verba* from Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). In the years following *Lorillard*, courts have often taken substance from Title VII and applied it to the ADEA. See *infra* notes 117–23 and accompanying text. Thus, since there has been continued borrowing from Title VII, courts should also borrow the disparate impact cause of action from Title VII and apply it to the ADEA as well. See O'Meara, *supra* note 16, at 138–39.

⁵⁹ Courts refusing to recognize the disparate impact cause of action under the ADEA have cautioned sister circuits against such interpretations. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988), *construed in Smith v. City of Jackson*, 351 F.3d 183, 186 n.1 (5th Cir. 2003) (noting that looking into congressional inaction can create varying readings; courts should use caution before using such logic).

⁶⁰ See, e.g., Michael C. Falk, Note, *Lost in the Language: The Conflict Between the Congressional Purpose and Statutory Language of Federal Employment Discrimination Legislation*, 35 RUTGERS L.J. 1179, 1189 (2004) (noting the driving purpose behind Title VII was "[t]o improve employment prospects for African-Americans by eradicating discrimination by employers.").

⁶¹ 29 U.S.C. § 621(b) (2000).

⁶² *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–36 (1971).

The other main argument upon which proponents of the disparate impact theory of liability under the ADEA rely was based upon the EEOC regulations.⁶³ As early as 1968, the agency charged with ADEA enforcement⁶⁴ has recognized that disparate impact claims are available under the Act.⁶⁵ Likewise, the EEOC incorporated and relied on the Court's decision in *Griggs* in allowing disparate impact claims under the ADEA.⁶⁶ Another important factor was that the EEOC's interpretations of the ADEA were published in the *Federal Register*, with an invitation for public comment before being implemented.⁶⁷ Thus, the EEOC regulations were created pursuant to a "note and comment" form of regulation and are true to the precedents of the Court. As such, they are entitled to deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁶⁸

⁶³ For regulations prior to 1979, the courts also turn to the regulations of the Department of Labor, the party charged with enforcement of the provisions in the ADEA before the responsibility was transferred to the EEOC. See Equal Employment Opportunity, 43 Fed. Reg. 19,807, 19,807 (May 9, 1978).

⁶⁴ The original agency charged with enforcement was the Department of Wages and Hours within the Department of Labor. The EEOC is currently charged with enforcement. Both agencies' regulations have recognized the availability of disparate impact claims under the ADEA. See Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination*, 47 AM. U. L. REV. 1071, 1105-07 (1998).

⁶⁵ See Age Discrimination in Employment, 33 Fed. Reg. 9172, 9172-73 (June 21, 1968).

Evaluation factors such as quantity or quality of production, or education level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

Id. at 9173. Similarly, the Department of Labor explicitly went over the requirements for testing to be valid nondiscriminatory methods. Age Discrimination in Employment, 34 Fed. Reg. 322, 322-23 (Jan. 9, 1969). Because otherwise valid testing will be carefully monitored to ensure that it does not adversely impact older workers who may be less test-savvy, the Department of Labor is advocating a disparate impact theory of liability. See *id.*

⁶⁶ See Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,725 (Sept. 29, 1981).

⁶⁷ See *id.* at 47,724.

⁶⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Justice Scalia relied heavily on this argument in his concurring opinion in *Smith*. See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1546 (2005) (Scalia, J., concurring). This may prove important, as Justice Scalia's reliance on *Chevron* deference cast the critical fifth vote in holding that disparate impact claims are viable under the ADEA. Justice Scalia did not join in Part III of Justice Stevens's opinion, which examined many of the

The final oft-found argument prior to *Smith* was actually a response to the opponents of ADEA disparate impact claims, who often pointed to similarities between the ADEA and the Equal Pay Act (EPA).⁶⁹ In response, courts and commentators who approved of disparate impact claims noted that the ADEA's exception for decisions based on "reasonable factors other than age" (RFOA) is compatible with a disparate impact cause of action.⁷⁰ The EPA only requires the existence of a neutral factor; whereas the ADEA requires the employer to demonstrate the reasonableness of the challenged factor—a burden essentially identical to that of disparate impact claims.

2. The Anti-Disparate Impact Side

If *Hazen Paper* was the threshold argument for all courts allowing disparate impact claims prior to *Smith*, the detractors used *Hazen Paper* as strong evidence that disparate impact claims are precluded under the ADEA.⁷¹ Courts turned to general aspects of the *Hazen Paper* decision when addressing the question. The first aspect is the *Hazen Paper* Court's declaration that disparate *treatment* claims "capture[] the essence of what

arguments advanced in the debate and made an independent decision by the plurality that disparate impact claims are recognized by the ADEA. *See id.* at 1539–44 (plurality opinion).

⁶⁹ *See infra* notes 82–83 and accompanying text.

⁷⁰ *See e.g.*, Brief of the Petitioners, *supra* note 39, at 17–21. By recognizing the RFOA clause, proponents of ADEA disparate impact claims argue that there can be no disparate impact claim unless the factor other than age is unreasonable. If disparate impact claims are not available, then there is no need to require an analysis of any factor other than age—as long as the employer did not use age as the deciding factor, there could be no claim. *Id.*

[T]he RFOA provision cannot be read to shield from liability any category of intentional discrimination on the basis of age: by its very language, it applies only when employees are treated differently on the basis of some other factor. This provision necessarily implies that it is possible to violate section 4(a) through differentiation based on a factor other than age—that is, without having a discriminatory purpose.

Id. at 19. For a further discussion of the relationship and implications of the Equal Pay Act and ADEA, see *infra* notes 82–83 and accompanying text.

⁷¹ *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1076 (7th Cir. 1994) (finding the Court's discussion of the ADEA in *Hazen Paper* to be "instructive"); see generally Zachary L. Karmen, Annotation, *Disparate Impact Claims Under Age Discrimination Act of 1967*, §§ 2 *et seq.*, 29 U.S.C.A. §§ 621 *et seq.*, 186 A.L.R. Fed. 1, § 2 (2003) (noting many courts have used the case to preclude disparate impact claims under the ADEA).

Congress sought to prohibit in the ADEA.”⁷² If Congress’s intent is captured within a disparate treatment claim, opponents argued, then there is no room for the application of a disparate impact claim. The second aspect actually looked to the concurring opinion in *Hazen Paper*, which explicitly addresses the case’s impact on the availability of disparate impact claims under the ADEA. The concurring opinion by Justice Kennedy, which Chief Justice Rehnquist and Justice Thomas joined, explicitly states that “nothing in the Court’s opinion should be read as incorporating in the ADEA context the so-called ‘disparate impact’ theory of Title VII.”⁷³ The concurring opinion also notes the existence of “substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA.”⁷⁴

The final argument hinged upon the Court’s declaration that some decisions, such as those based on pension status, which often but do not always correlate with age, do not carry the problem of “inaccurate and stigmatizing stereotypes.”⁷⁵ Prior to *Smith*, courts argued that this language was incompatible with the theory of disparate impact, which does not require a showing of intent.⁷⁶

Courts that prohibited disparate impact claims also turned to an analysis of the ADEA and Title VII.⁷⁷ In examining the relationship between Title VII and the ADEA, courts that did not recognize ADEA disparate impact claims focused on the differences between the two Acts.⁷⁸ Such courts focused on two key differences. They first looked to Section (2) of Title VII, which includes the phrase “or applicants for employment”—a phrase glaringly absent from the ADEA’s parallel provision.⁷⁹ Thus, in cases involving job applicants, many courts refused to recognize any type of disparate impact claim, even if the same claim would be cognizable under

⁷² *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993) (“It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.”).

⁷³ *Id.* at 618 (Kennedy, J., concurring).

⁷⁴ *Id.*

⁷⁵ *Id.* at 611.

⁷⁶ *Karmen*, *supra* note 71, at 18. In a disparate treatment claim, liability rests upon whether or not the decision was based upon the age of the plaintiff. *Hazen Paper*, 507 U.S. at 610. Thus it is critical to the plaintiff’s case to prove a discriminatory intent on the part of the defendant. *Karmen*, *supra* note 71, at 18. In contrast, disparate impact claims do not require a showing of discriminatory intent, as they arise from practices that are facially neutral, but negatively impact the protected group more than others. *Id.*

⁷⁷ See, e.g., *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1077 (7th Cir. 1994).

⁷⁸ See *id.* (“In the relevant statutory provisions, however, Title VII and the ADEA differ in a significant way.”).

⁷⁹ See *supra* notes 49–50 and accompanying text.

Title VII's provisions if the decision had been based on race rather than on age.⁸⁰

The second textual difference often noted between the ADEA and Title VII involves the RFOA provision. Prior to *Smith*, many interpreted this phrase to exclude decisions based on other factors that happened to correlate with age—the basis of any disparate impact claim.⁸¹ The RFOA language of the ADEA was likened to similar language present in the EPA, which permits differences in pay between genders for “factor[s] other than sex.”⁸² Perhaps more importantly, the EPA's phrase has been construed as prohibiting disparate impact claims.⁸³ Thus courts, in denying the recognition

⁸⁰ See e.g., *Francis W. Parker Sch.*, 41 F.3d at 1077–78 (finding the exclusion of this language, particularly given the nearly verbatim language otherwise present in the ADEA, to be quite persuasive).

⁸¹ See e.g., *id.* at 1077 (“It suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA.”).

⁸² 29 U.S.C. § 206(d)(1) (2000).

⁸³ See, e.g., *Colby v. J.C. Penney, Inc.*, 811 F.2d 1119, 1127 (7th Cir. 1987); *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986) (accepting that the Bennett Amendment precludes disparate impact claims based on wage discrimination in dicta); *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1325 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999) (suggesting in dicta that “the exception eliminates disparate impact from the armamentarium of weapons available to plaintiffs under the Equal Pay Act and, correspondingly, confines the scope of liability to instances of intentional discrimination, that is, to instances of disparate treatment”); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996). Decisions such as these almost universally rely on the Supreme Court case of *County of Washington v. Gunther*, 452 U.S. 161 (1981) (holding that employers may be successful if “their pay differentials are based on a bona fide use of ‘other factors other than sex’”). *Gunther*, 452 U.S. at 170. In reaching this result, the Court turned to the legislative history of the EPA:

[L]anguage of the Bennett Amendment—barring sex-based wage discrimination claims under Title VII where the pay differential is “authorized” by the Equal Pay Act—suggests an intention to incorporate into Title VII only the affirmative defenses of the Equal Pay Act, not its prohibitory language requiring equal pay for equal work, which language does not “authorize” anything at all. Nor does this construction of the Amendment render it superfluous.

Id. at 162 (syllabus).

However, there seems to be some rising debate about the availability of disparate impact claims under the ADEA. For example, in *EEOC v. J.C. Penney Co.*, 843 F.2d 249 (6th Cir. 1988), the court specifically found that the language in the EPA can allow a disparate impact claim. *Id.* at 253. Specifically, the court noted the following:

Penney contends that the Bennett Amendment precludes any claim of wage discrimination based on disparate impact, arguing that the Equal Pay Act allows a wage differential if it is based on *any* factor other than sex, so that a claim of

of disparate impact claims under the ADEA, imported the interpretation of the EPA's phrase to the ADEA.

Another argument rested upon an interpretation of the phrase "because of," which appears in § 4(a)(2). In examining the common usage of "because of,"⁸⁴ several courts and commentators argued that this phrase requires that "the motivating factor"⁸⁵ behind the employer's decision must be age.⁸⁶ Further, a natural construction of the statute shows that the "because of" phrase "modifies the entire enumeration of employer practices and not just practices which 'otherwise adversely affect' an employee's status."⁸⁷ Thus, some argued, disparate impact claims, which, by their very nature do not require a "motivating factor" are necessarily barred. In other words, "because of" was read as requiring intent.⁸⁸

Beyond the textual differences between Title VII and the ADEA are several historical differences that tended to impact the analysis of the disparate impact debate. First, courts not recognizing the viability of disparate impact claims under the ADEA often pointed to Congress's failure to amend the ADEA to allow disparate impact claims while simultaneously

discrimination based on the disparate impact resulting from the use of this factor would automatically be barred. . . .

In our circuit, however, the Bennett Amendment cannot constitute a blanket bar to all claims of wage discrimination based on disparate impact because the "factor other than sex" defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.

Id. at 253 (internal citations omitted). Other courts have reached similar conclusions. *See, e.g.,* Cullen v. Ind. Bd. of Trustees, 338 F.3d 693, 698 (7th Cir. 2003) ("[T]he EPA does not require proof of discriminatory intent."); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992) (requiring that the "employer prove[] that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue").

⁸⁴ "By reason of; on account of." WEBSTER'S II NEW COLLEGE DICTIONARY 98 (Margery S. Berube, et. al. eds., Houghton Mifflin Co. 1995). Reason is further defined as "1. The basis or motive for an action, decision or belief. 2. A declaration explaining or justifying an action, decision, or belief. . . . 3. An underlying fact or motive that provides logical sense for a premise or occurrence. . . ." *Id.* at 923.

⁸⁵ Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993).

⁸⁶ Brief of the National League of Cities, et al. as Amici Curiae Supporting Respondents at 7, *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (No. 03-1160), available at 2004 WL 1905734, at *7.

⁸⁷ *Id.* at 8.

⁸⁸ Transcript of Oral Argument at 45, *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (No. 03-1160), available at 2004 U.S. TRANS. LEXIS 61, at *45. Respondents in the *Smith v. City of Jackson* case have urged that such language indicates that "[t]his statute is preoccupied with intent." *Id.*

amending Title VII to explicitly allow such claims.⁸⁹ The Civil Rights Act of 1991, which amended Title VII, did not amend the ADEA in regard to disparate impact claims; however, it did amend the ADEA in other ways.⁹⁰ Thus, Congress specifically *failed* to add a disparate impact cause of action to the ADEA although it had a prime opportunity to do so.

Another argument was based on the ADEA's legislative history. Many found that an examination of the history of the ADEA does not support a conclusion that disparate impact claims were intended under the Act.⁹¹ Specifically, Secretary Wirtz concluded that at its core, age discrimination differed from race discrimination:

The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example—race. . . .

Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is no significant discrimination of this kind so far as older workers are concerned.⁹²

Secretary Wirtz's report continued to distinguish discrimination based upon age and race. For example, the report notes that employment discrimination under Title VII is often motivated by prejudices originating outside of the employment sphere; yet "[t]here are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment."⁹³ According to the report, the

⁸⁹ See *Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996).

⁹⁰ Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071.

⁹¹ See, e.g., A. Blumrosen, *Interpreting the ADEA: Intent of Impact?*, in *AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS* 68, 73 (Monte B. Lake ed., 1982) ("Th[e] legislative history [of the ADEA] drives the reader to the conclusion that 'intent' to discriminate on the basis of age was the gravamen of age discrimination, and that actions which have 'adverse effect' on older workers were not to be considered illegal.").

⁹² THE OLDER AMERICAN WORKER, *supra* note 25, at *37.

⁹³ *Id.* at *43-44.

elderly are not discriminated against outside of the employment sphere because gradually everyone grows older.⁹⁴

Other comments in the legislative history of the ADEA also recognize the differences between race and age discrimination.⁹⁵ The legislative history of Title VII may also suggest that Congress considered age discrimination to be different from discrimination on the basis of, for example, race, as Congress specifically rejected adding "age" as an illegal basis for discrimination.⁹⁶

A final argument attempted to distinguish the policies underlying the *Griggs* decision from those upon which the arguments for disparate impact claims under the ADEA are based. The *Griggs* decision rested upon the critical fact that African Americans historically had been discriminated against in the educational fields and that the employer was using this historical fact as a means of presently discriminating against African Americans.⁹⁷ However, older employees have not faced this historical resistance.⁹⁸ The employer in *Griggs* also used the new policy as a means of indirect segregation—such practices are not likely for older workers, as many companies are run by older white males.⁹⁹

The Supreme Court finally provided an answer to this debate in March 2005. *Smith v. City of Jackson* firmly presented the Court with the question of whether or not disparate impact claims are cognizable under the ADEA.

⁹⁴ *Id.* at *44. Because everyone ages, there are generally people of all ages living "in close association rather than in separate and distinct social or economic environments [as one may find people of separate races, religions, etc.]." *Id.*

⁹⁵ See *Age Discrimination in Employment: Hearings Before the General Subcomm. on Labor of the H. Comm. on Education and Labor*, 90th Cong. 40 (1967) (comments of Rep. Dent, Chairman of House Subcommittee on Labor) ("I personally believe this is a problem that ought not to be mixed up or confused in the area of discriminations that we have been dealing with in recent years regarding sex, national origin, race, or color."); *id.* at 449 (comments of Rep. Burke) ("Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker.").

⁹⁶ See *supra* notes 22–23 and accompanying text. Congress also rejected a proposal in 1967 to amend Title VII to add age discrimination. See O'Meara, *supra* note 16, at 141.

⁹⁷ See O'Meara, *supra* note 16, at 140 ("The Court in *Griggs* was concerned with personnel policies that operated to freeze the status quo of prior discriminatory practices, and with educational segregation that resulted in built-in headwinds.").

⁹⁸ See *id.* Older employees, rather than facing "headwinds" have often received the benefits of "tailwinds" such as annual pay increases. *Id.*

⁹⁹ See *id.* at 141. Studies have also shown that older white males receive the most assistance under the ADEA. *Id.*

Although the Court had declined to answer this question previously, *Smith* finally provides a concrete answer.

C. *Smith v. City of Jackson*

On October 1, 1998, the city of Jackson, Mississippi implemented a new performance pay plan for its police officers ("the plan") with the stated purpose of making its compensation schemes more competitive with other public sector agencies.¹⁰⁰ The plan was revised on March 1, 1999.¹⁰¹ Under the terms of the plan, officers and dispatchers with fewer than five years of tenure received proportionately greater increases in pay than those with greater than five years of tenure.¹⁰² As a result of the implementation of the plan, older officers received raises that were four standard deviations lower than the raises awarded to younger officers.¹⁰³ On May 1, 2001, thirty officers and dispatchers over the age of forty sued the city, claiming that the pay plan had a disparate impact on the class of employees protected by the ADEA.¹⁰⁴ The plaintiffs also alleged that the plan resulted in disparate treatment under the ADEA.¹⁰⁵

The case was brought in the United States District Court for the Southern District of Mississippi.¹⁰⁶ During the course of discovery, several disputes arose between the parties.¹⁰⁷ Plaintiffs alleged that the defendants were not complying with discovery orders and ultimately moved for sanctions and to strike portions of the defendants' experts' reports.¹⁰⁸ While these motions

¹⁰⁰ The official purpose of the performance pay plan was "[t]o provide a compensation plan that will attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability." *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (No. 03-1160), available at 2004 WL 2289230 at jt. app. *15.

¹⁰¹ *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003).

¹⁰² *Id.*

¹⁰³ Brief of the Petitioners, *supra* note 39 at 5.

¹⁰⁴ *Id.* The plaintiffs also alleged that the plan resulted in disparate treatment under the ADEA. *Smith v. City of Jackson*, 351 F.3d 183, 184 (5th Cir. 2003). The district court ultimately dismissed this claim; however, the Fifth Circuit remanded the issue on appeal. *See id.* For purposes of this Note, the disparate treatment claims are not discussed in detail.

¹⁰⁵ *Smith*, 351 F.3d at 184.

¹⁰⁶ *Id.* at 183.

¹⁰⁷ *See id.* at 185.

¹⁰⁸ Brief of Appellants at 3, *Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003) (No. 02-60850), available at 2002 WL 32387897.

were still pending, the district court judge granted the defendants' motion for summary judgment on the plaintiffs' claims and dismissed the plaintiffs' motions as moot.¹⁰⁹ The district court, without issuing an opinion, concluded that the disparate impact theory is not recognized under the ADEA.¹¹⁰

Plaintiffs appealed this decision to the Fifth Circuit, alleging that the district court erred in its conclusion that disparate impact claims are not viable claims under the ADEA.¹¹¹ The question was a matter of first impression before the court; thus, the court thoroughly analyzed the issue. The court first noted that its analysis was not based upon the silence of Congress regarding disparate impact claims under the ADEA in the Civil Rights Act of 1991.¹¹² Rather, the court examined both the similarities and differences between Title VII and the ADEA.¹¹³ While recognizing the similarity in language between the prohibitory sections of the two laws, the court was ultimately persuaded that the "reasonable factors other than age" clause of the ADEA "create[d] a critical 'asymmetry' between the ADEA and Title VII."¹¹⁴ The differences between the two statutes also persuaded the court that the rule of *in pari materia* was not applicable to the question at hand.¹¹⁵

The court was, however, persuaded by the similarities between the language of the ADEA and the EPA,¹¹⁶ and held that the language in the ADEA was not a defense to a disparate impact claim, but prohibited all such claims.¹¹⁷ Finally, the court turned to the legislative history and policy considerations of the ADEA, ultimately concluding that the driving concerns behind the recognition of disparate impact claims under Title VII were absent

¹⁰⁹ *Smith v. City of Jackson*, 351 F.3d 183, 185 (5th Cir. 2003).

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *See id.* at 186 n.1. The court declined to draw inferences from the legislative silence regarding disparate impact claims under the ADEA in the Civil Rights Act of 1991, although the same Act specifically reserved disparate impact claims under Title VII and amended the ADEA in other ways. *See id.* The court found that the Civil Rights Act of 1991 was not particularly probative as to the question before it, as its main purpose was to override certain judicial interpretations of Title VII. *See id.*

¹¹³ *See Smith*, 351 F.3d at 188–93.

¹¹⁴ *See id.* at 190. This asymmetry is "a salient textual difference between the substantive liability provisions of the ADEA and Title VII," which, according to the court, is not mentioned or recognized by the circuits that allow disparate impact claims under the ADEA. *Id.*

¹¹⁵ *Id.* at 190 n.9.

¹¹⁶ *See supra* notes 80–81 and accompanying text.

¹¹⁷ *See Smith v. City of Jackson*, 351 F.3d 183, 193 (5th Cir. 2003).

from the ADEA.¹¹⁸ Thus, the circuit court affirmed the district court's grant of summary judgment for the defendants.

Petitioner's writ of certiorari to the Supreme Court was granted on March 29, 2004.¹¹⁹ Oral arguments were held on November 3, 2004. The Court reached its decision on March 30, 2005, affirmatively answering that disparate impact claims are cognizable under the ADEA. The Court also turned to former Title VII jurisprudence under *Wards Cove*¹²⁰ in its interpretation of the requirements for a disparate impact suit under the ADEA.

D. A Definitive Answer: Disparate Impact Claims Under the ADEA Requires Analysis Under Wards Cove

After years of intense dispute, a definitive answer on the above debate has been reached. A majority of the Court, consisting of Justices Stevens, Souter, Breyer, Ginsburg, and Scalia, held that disparate impact claims are recognized by the ADEA.¹²¹ The main opinion was written by Justice Stevens, with a concurrence by Justice Scalia. Justices O'Connor, Kennedy, and Thomas concurred only in the judgment.¹²²

¹¹⁸ See *id.* "Because the broad remedial purpose behind Title VII was central to the Court's statutory construction of Title VII in *Griggs*, the difference between the purposes behind the ADEA and Title VII is directly relevant to whether a disparate impact theory is cognizable under the ADEA." *Id.* For a more detailed discussion of the ADEA's legislative history, see *supra* Part II.A.

¹¹⁹ *Smith v. City of Jackson*, 124 S. Ct. 1724 (2004).

¹²⁰ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

¹²¹ See *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). Although Justice Stevens wrote for the Court, his opinion with respect to the reasoning behind the availability of disparate impact claims (Part III) is only a plurality opinion. Justice Scalia did not join in Part III, but rather wrote a concurring opinion. His concurrence cast the fifth and deciding vote in upholding the disparate impact cause of action.

¹²² Although Justice O'Connor's opinion will not be discussed in detail in this Note, it is important to understand the basic reasoning of the opinion. Justice O'Connor's concurrence would have held that disparate impact claims were not cognizable under the ADEA. See *Smith*, 125 S. Ct. at 1549 (O'Connor, J., concurring). O'Connor's opinion relied on the following factors: (1) the text, history, and purpose of the ADEA indicate that disparate impact claims were not contemplated by Congress; (2) differences between the ADEA and Title VII imply that the ADEA should not be interpreted in the same vein as Title VII; (3) the agencies' interpretations of the statute have never consistently allowed for disparate impact causes of action. See *id.* Further analysis of each of these arguments can be found in Part II.B.2, *supra*. As this group of Justices refused to recognize disparate impact claims, it concurred in the judgment of the Court, which held that the plaintiffs' claims should be denied. See *Smith*, 125 S. Ct. at 1560.

1. Justice Stevens's Opinion

Justice Stevens, in a section of the opinion joined only by a plurality,¹²³ interpreted the ADEA to include disparate impact theories of analysis. In reaching this conclusion, the Justices relied on three factors: (1) the text and purpose of the ADEA was similar to Title VII, which allows disparate impact claims;¹²⁴ (2) the EEOC has consistently interpreted the ADEA to allow such claims;¹²⁵ and (3) the RFOA provision only has meaning if disparate impact claims are allowed.¹²⁶

Justice Stevens began by looking at the similar purpose and structure of the ADEA and Title VII.¹²⁷ The plurality relied heavily on the report of Secretary Wirtz,¹²⁸ indicating that the congressional purpose relied upon in *Griggs*¹²⁹ was strikingly similar to the purpose expressed by Secretary Wirtz.¹³⁰ Specifically, just as the *Griggs* Court did not find racial animus to be a problem in that case, the report of Secretary Wirtz "concluded that there was no significant discrimination of that kind so far as older workers are concerned."¹³¹ Justice Stevens also noted that the text of both the ADEA and Title VII "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."¹³² Accordingly, Stevens found that the outcome in *Griggs* highly suggested that disparate impact claims should also be recognized under the ADEA, as the statute's purposes and text were nearly identical.¹³³

The second factor upon which the plurality relied involves the EEOC's interpretations. Noting briefly that the EEOC and the Department of Labor had interpreted the ADEA to include disparate impact claims, Justice Stevens

¹²³ Justices Souter, Breyer, and Ginsburg joined in Part III of Justice Stevens's opinion.

¹²⁴ See *supra* notes 49–62.

¹²⁵ See *supra* notes 63–68.

¹²⁶ See *supra* note 70.

¹²⁷ See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1540 (2005); see also *supra* notes 49–62.

¹²⁸ See *supra* notes 25–26.

¹²⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹³⁰ See *Smith*, 125 S. Ct. at 1541.

¹³¹ *Id.* at 1542 n.5 (citing *THE OLDER AMERICAN WORKER*, *supra* note 25). For further discussion of Secretary Wirtz's report, see *supra* notes 25–26.

¹³² *Smith*, 125 S. Ct. at 1542 (emphasis in original).

¹³³ *Id.*

indicated that this was an additional factor weighing in favor of recognizing such claims.¹³⁴

Finally, Justice Stevens relied upon the RFOA provision of the ADEA in establishing the availability of disparate impact claims. Turning to *Hazen Paper*, Justice Stevens noted that under § 4(a)(1) there is no prohibition on discrimination on factors other than age—in other words, as long as age was not the factor at issue, there can be no claim for disparate treatment.¹³⁵ Therefore, § 4(a)(2), which contains the RFOA provision, is pointless if only disparate treatment causes of action are available to plaintiffs.¹³⁶ The RFOA provision can only limit an employer's liability if used to defend a disparate impact claim.¹³⁷

Justice Scalia also joined the final portion of Justice Stevens's opinion, thus creating a majority. This final portion, while accepting the disparate impact cause of action, narrowed the scope of recovery for such claims under the ADEA.¹³⁸ The Court found the 1991 amendment to Title VII to be particularly illuminating.¹³⁹ The 1991 amendment to Title VII was spurred by the Court's decision in *Wards Cove Packing Co. v. Atonio*.¹⁴⁰ Noting that the 1991 amendment did not modify the ADEA, the Court held that the standard announced in *Wards Cove* is applicable to all disparate impact claims brought under the ADEA.¹⁴¹

Applying the *Wards Cove* standard to the plaintiffs, the Court held that the plaintiffs failed to identify a specific requirement or practice with an adverse impact on older employees.¹⁴² Holding that the city's reliance on seniority and rank was reasonable in its goal of increasing the salary of junior officers, the Court found that the decision was based on a reasonable factor other than age.¹⁴³ Accordingly, the plaintiffs in the *Smith* case could not meet

¹³⁴ *Id.* at 1544.

¹³⁵ *Id.*

¹³⁶ *Id.* ("In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place.").

¹³⁷ *Id.* at 1544.

¹³⁸ *Smith v. City of Jackson*, 125 S. Ct. 1536, 1544 (2005).

¹³⁹ *Id.* at 1545.

¹⁴⁰ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

¹⁴¹ *Smith*, 125 S. Ct. at 1545. The holding in *Wards Cove* "narrowly construed the employer's exposure to liability on a disparate-impact theory." *Id.* For further discussion of the *Wards Cove* standard, see *infra* notes 209–13.

¹⁴² *Smith*, 125 S. Ct. at 1545.

¹⁴³ *Id.*

the more stringent *Wards Cove* standard, and the employer produced a legitimate business justification; the plaintiffs' disparate impact claim failed.

2. Justice Scalia's Concurrence

Justice Scalia's opinion focused on the EEOC's interpretations. Holding that the "reasonable views" of the EEOC were entitled to *Chevron*¹⁴⁴ deference, Justice Scalia supported the agency's interpretations advocating the availability of disparate impact suits under the ADEA.¹⁴⁵ The statutory language of the ADEA grants the agency the ability to issue "such rules and regulations as it may consider necessary or appropriate."¹⁴⁶ Justice Scalia found that the EEOC had upheld the availability of disparate impact claims in three ways: (1) the agency's final interpretation supported the availability of such claims;¹⁴⁷ (2) the Department of Labor, the previous administrative agency, had also advocated the availability of such claims;¹⁴⁸ and (3) the EEOC has upheld the availability of disparate impact claims as both a party and an amicus curiae in the lower courts.¹⁴⁹

Justice Scalia supported the reasonableness of the agency's interpretation by again turning to the RFOA provision.¹⁵⁰ Under Scalia's reading of the clause, "the RFOA defense is relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA. Hence, the unavoidable meaning of the regulation at issue is that the ADEA prohibits employer actions that have an 'adverse impact on individuals in the protected age group.'"¹⁵¹ Thus, Justice Scalia, like Justices Stevens, Souter, Breyer, and Ginsburg, found that the RFOA language to be particularly revealing. As discussed earlier, Justice

¹⁴⁴ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁴⁵ *Smith v. City of Jackson*, 125 S. Ct. 1536, 1546 (2005).

¹⁴⁶ 29 U.S.C. § 628 (2000).

¹⁴⁷ *Smith*, 125 S. Ct. at 1547. The final regulation of the EEOC is as follows:

When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. . . .

29 C.F.R. § 1625.7(d) (2004). Furthermore, the comments accompanying the regulation indicate that the section had been revised to ensure that employment practices with a disparate impact on the protected class must be justified under the business necessity clause. 46 Fed. Reg. 47,724, 47,725 (1981) (internal citations omitted).

¹⁴⁸ *Smith*, 125 S. Ct. at 1544. See also *supra* notes 64–65 and accompanying text.

¹⁴⁹ *Smith*, 125 S. Ct. at 1547 n.1.

¹⁵⁰ *Id.* at 1548.

¹⁵¹ *Id.*

Scalia also joined Stevens's opinion relating to the analysis under the *Wards Cove* standard, and thus also agreed that the plaintiffs' claims must fail.¹⁵²

III. POSSIBLE IMPLICATIONS OF THE COURT'S DECISION

Regardless of what the Court decided in *Smith*, it was clear that the implications of the decision would ripple through the lower courts and, more importantly, through human resources departments across the country. The effects of the decision are not to be ignored. The Court, in officially upholding disparate impact claims under the ADEA, could have opened employers to a flood of new litigation. Fortunately, the Court's application of *Wards Cove* should limit the number of new claims facing employers.

Perhaps the most important implication of *Smith* was the extent to which the Court relied upon Title VII in reaching its decision. Over the years, courts have looked extensively to Title VII in construing various aspects of the ADEA. The analogy between Title VII and the ADEA has been looked to for more than just disparate impact claims. Courts have also drawn parallels when considering, for example, the definition of "employer,"¹⁵³ burden-shifting in disparate treatment cases,¹⁵⁴ the interpretation of the ADEA's bona fide occupational qualification defense,¹⁵⁵ and the running of the statute of limitations for filing a claim with the EEOC.¹⁵⁶ Congress has also encouraged some of the analogies, making some of the changes to Title VII applicable to the ADEA as well.¹⁵⁷ The analogies have been drawn because, from the beginning, those in favor of the ADEA urged courts to adopt Title

¹⁵² *Id.* at 1549.

¹⁵³ See *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1263 (11th Cir. 1997) ("In interpreting ADEA's definition of 'employer,' Title VII cases are helpful. In addition, most of the cases interpreting the definition of 'employer' are found in Title VII cases. The only notable difference between the two statutes' definitions of 'employer' is the number of 'employees' each statute requires.").

¹⁵⁴ See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn't Bark*, 39 WAYNE L. REV. 1093, 1100 (1993).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ The Civil Rights Act of 1991 imported the changes to Title VII's statute of limitations provisions to the ADEA and changed some of the ADEA statute of limitations sections to mirror Title VII. See Margaret M. Gembala, Note, *ADEA and the Hostile Work Environment Claim: Are the Circuit Courts Dragging Their Feet at the Expense of the Harassed Older Worker?*, 7 ELDER L.J. 341, 350 (1999).

VII standards into the ADEA and to treat ADEA plaintiffs like African American plaintiffs under Title VII were treated.¹⁵⁸

Fortunately for employers, the Court, although continuing to apply Title VII precedent, applied a very narrow aspect of Title VII jurisprudence. In truth, *Wards Cove*, although a case originally contemplating Title VII disparate impact claims, now serves little to no purpose in Title VII claims, as the Supreme Court has noted that the 1991 Amendment to the Civil Rights Act of 1964 effectively superseded the *Wards Cove* analysis.¹⁵⁹ This essential “break” of Title VII precedent should shield employers from some of the claims that might have been possible under a wider interpretation of ADEA disparate impact claims. Among the likely implications that may now be avoided are the possible creation of a new claim—hostile work environment claims based on age discrimination—and problems associated with reductions in force. This Note shall discuss each of these implications in turn.

A. The Creation of a New Claim—Hostile Work Environment and the ADEA

Many sexual harassment cases involve claims of a hostile work environment. In a hostile work environment claim, an employee asserts that “the workplace is permeated with ‘discriminatory intimidation, ridicule and insult[]’ that is [sic] ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment’”¹⁶⁰ due to the actions of his or her coworkers. As a result, the work atmosphere becomes intolerable. Hostile work environment claims are considered Title

¹⁵⁸ Rhonda M. Reaves, *One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839, 872 (2004). On the other hand, courts have not used complete uniformity in importing Title VII meanings into the ADEA. These differences arise mostly from the differing constitutional standards applied to race and age. For example, the two laws differ in terms of the following: (1) uniform application of the disparate impact claim, (2) “refusal to permit ‘reverse’ age discrimination cases, and [(3)] . . . the inconsistent application of relaxed pleading standards in age cases.” *Id.* at 873–74.

¹⁵⁹ See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1545 (2005). At least one other court has used a similar analysis. See *Rossiter v. Potter*, No. Civ.A. 02-12192MBB, 2005 WL 1288063, at *7 (D. Mass. May 23, 2005) (turning to pre-1991 Title VII reasoning in upholding that a federal employee has no right to a trial by jury under the ADEA).

¹⁶⁰ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

VII actions, as the basic claim is discrimination on the basis of sex.¹⁶¹ While the cause of action has been slow to spread to other situations, if the ADEA had continued to follow in Title VII's footsteps, employers may soon have faced hostile work environment claims based on age discrimination as well.¹⁶²

In fact, at least one circuit has recognized that very claim. In *Crawford v. Medina General Hospital*, the Sixth Circuit found it "relatively uncontroversial" that hostile work environment claims should be extended to the ADEA.¹⁶³ In recognizing the cause of action, the court stated the elements of the claims as: (1) plaintiff is protected by the ADEA (i.e., forty years or older); (2) plaintiff was harassed based on his or her age; (3) the harassment interfered with his or her employment duties and created a hostile work environment; and (4) the employer is liable.¹⁶⁴ The Seventh Circuit has also considered the issue, but seems to have wavered on the matter.¹⁶⁵

¹⁶¹ See *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) (After being fired, plaintiff filed a charge under Title VII alleging that her supervisor had sexually harassed her. The Court held that, as long as the attentions of the supervisor were unwelcomed, then the plaintiff had a basis for the hostile work environment claim, even if any sexual acts actually performed were voluntary. The Court thus affirmed that, whether or not there was a quid pro quo sexual harassment situation, where conduct has the purpose or effect of interfering with an employee's work performance or creating a hostile work environment, the conduct can form the basis of a sexual harassment claim.).

¹⁶² See David M. Wissert & John D. Coyle, *Age Discrimination May be Next Frontier for Employers*, NAT'L L.J., Apr. 29, 2002, at A29, available at <http://www.lowenstein.com/new/Agediscrimination04-29-02.pdf>.

¹⁶³ *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830 (6th Cir. 1996). In *Crawford*, the plaintiff's claim for hostile work environment was based on statements by her supervisor that those over age fifty-five should not work and that older people should remain quiet and not cause problems. The plaintiff also claimed that her lack of invitation to social gatherings was further evidence of the hostile work environment. While the Sixth Circuit explicitly recognized the availability of hostile work environment claims under the ADEA, the court denied the plaintiff's claims, holding that she had failed to make the proper showing that the harassment interfered with her work or created an environment that was objectively hostile. *Id. But cf. Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1244-45 n.80 (11th Cir. 2001).

¹⁶⁴ See *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999); *Federal Courts of Appeals Begin to Recognize Hostile Work Environment Claims Under ADEA*, <http://www.saspc.com/artadea3.htm> (last visited Sept. 2, 2005).

¹⁶⁵ See Wissert & Coyle, *supra* note 162, at A30. Even before the Sixth Circuit recognized the availability of a hostile work environment claim under the ADEA, the Seventh Circuit, without deciding whether such claims are available, stated that harassment claims under the ADEA are rare and held that the plaintiff in the instant case had failed to state a claim under the facts presented. *Id.* (discussing *Young v. Will County Dept. of Pub. Aid*, 882 F.2d 290 (7th Cir. 1989)). A decade later, the Seventh Circuit

Some commentators have claimed that, without a hostile work environment claim, older workers who are harassed because of their age will be left without recourse in the courts.¹⁶⁶ However, this ignores the fact that there may be direct evidence of age discrimination that would allow for a disparate treatment claim. Older workers will not be left without recourse—the traditional claim of disparate treatment can protect their rights.¹⁶⁷ Even in cases of harassment by coworkers, if the supervisor knew of the situation and took no action, such behavior could be considered ratification of the action, and thus satisfy the requirements of a disparate treatment claim. The only situation in which a plaintiff would have a difficult time succeeding in a claim of direct discrimination would be cases of coworker harassment where the supervisor had no knowledge of the situation—a situation that may also pose difficulties under a Title VII hostile work environment claim.¹⁶⁸

Because older workers are not left without recourse, it seems pointless to recognize a new cause of action for hostile work environment under the ADEA. However, the Sixth Circuit has done just that, and it does not seem unreasonable that other circuits would have recognized the claim as well if the ADEA had continued to follow in Title VII's footsteps.

If the Court had continued to follow current Title VII jurisprudence with respect to the ADEA and had recognized disparate impact causes of action with the same burden as Title VII claims, lower courts may have taken the decision as directive that the two statutes should continue to be treated similarly. Similar treatment would provide support for the proposition that hostile work environment claims should also be recognized by the ADEA. Thus, in allowing disparate impact causes of action, the Court may have actually been allowing hostile work environment claims as well. The *Smith* decision may have indirectly created *two* new and distinct causes of action under the ADEA.

Fortunately, the Court's treatment of *Wards Cove* should curb the application of hostile work environment claims to the ADEA. First, the Supreme Court specifically departed from current Title VII precedent in adopting the *Wards Cove* standard. This may indicate to lower courts that, although the ADEA and Title VII continue to be treated *similarly*, identical

changed direction, stating that it had never had the opportunity to consider the availability of such claims. *Id.*

¹⁶⁶ See, e.g., Gembala, *supra* note 157, at 343–45.

¹⁶⁷ Disparate impact claims may also be available, though will be difficult to prove given the standard adopted in *Smith*.

¹⁶⁸ See, e.g., *Bowen v. Mo. Dep't of Soc. Servs.*, 311 F.3d 878, 883 (2002) ("Assuming Bowen's claim is principally one based on co-worker harassment, she must also show that the [supervisor] knew or should have known of [the co-worker's] racially discriminatory harassment and failed to take adequate remedial measures to end the harassment.").

application is not necessarily warranted. While Title VII was important to the decision in *Smith*, the application of *Wards Cove* is a distinct and separate analysis that is not shared by Title VII claims. By allowing ADEA defendants to show only a reasonable business justification and not requiring an “essential” or “indispensable” justification, the Court indicated an unwillingness to allow expansive treatment of ADEA claims. As such, lower courts should take the Court’s decision as an indication not to quickly expand the ADEA to other forms of claims.

However, hostile work environment claims do not share the same burden of proof and prima facie case requirements as disparate impact claims. Thus, the *Smith* decision did not directly prohibit such causes of action. Lower courts may instead choose to interpret the Supreme Court’s decision, which again announced the similarities between the ADEA and Title VII, as the beginning of recognition of other Title VII claims under the ADEA. Until the issue is once again addressed in the lower courts, it is unclear from the *Smith* opinion what the likely outcome will be.¹⁶⁹

B. *The Problems with Reductions in Force*

A reduction in force (RIF) is, unfortunately, a concept with which many of today’s workers are now familiar. While early projections estimate a slight decrease in the unemployment rate for 2005,¹⁷⁰ reductions in force will still be an issue for today’s employers. Human resource managers could have found their tasks in implementing RIFs even more daunting if the *Wards Cove* standard had not been applied to disparate impact claims under the ADEA. To illustrate the problem, let us assume, arguendo, that the Supreme Court had allowed disparate impact causes of actions under the ADEA but had *not* applied the more restrictive *Wards Cove* standard.

¹⁶⁹ At least one court may be addressing the question sooner rather than later. A pro se plaintiff before a district court in the Eleventh Circuit has asserted, among other claims, a hostile work environment claim under the ADEA. *See* Mihalik v. Expressjet Airlines, No. 3:04cv258/RV/EMT, 2005 U.S. Dist. LEXIS 15091, at *6 (N.D. Fla. June 23, 2005). Although the plaintiff has thus far avoided summary judgment, the judge’s opinion makes it clear that the plaintiff’s claim may still have several obstacles to overcome before a favorable judgment could be granted. *See id.* A plaintiff before a district court in the Tenth Circuit has also been allowed to pursue the claim. *See* Wyatt v. Occidental Petroleum Corp., No. 04-CV-939-TCK-SAJ, 2005 WL 2508521, at *6–7 (N.D. Okla. Oct. 11, 2005) (allowing plaintiff to pursue a hostile work environment cause of action under the ADEA).

¹⁷⁰ Early projections estimate a 5.1% unemployment rate for the first quarter of 2005, which is projected to fall to 4.9% in the fourth quarter of 2005. Ilhan K. Geckil, *Forecasted Economic Indicators*, ANDERSON ECONOMIC GROUP (Feb. 8, 2005), http://www.andersoneconomicgroup.com/Pubs/forecasts/2005/forecast_feb05.htm.

Currently, RIFs can create several potential legal problems, including: (1) discrimination claims on the basis of protected criteria, including race, age, disability, and other protected classes; (2) discrimination claims brought under the Family and Medical Leave Act for discriminating against employees on leave; (3) retaliation claims; (4) breach of contract claims; and (5) Work Adjustment and Retraining Notification Act (WARN)¹⁷¹ claims.¹⁷² Currently, prudent employers conduct a statistical analysis before conducting a RIF¹⁷³ in order to eliminate a problem before the RIF, and thus reduce the risk of a lawsuit.¹⁷⁴ Statistical analysis is an important step because many courts accept a statistical disparity as *prima facie* proof of disparate impact.¹⁷⁵

Unfortunately, statistical analysis will become significantly more difficult if employers must also analyze for disparate impact based on age. The ADEA covers situations where one protected employee is replaced by a younger employee who is also within the protected class.¹⁷⁶ Thus, employers performing a statistical analysis would need to examine not only whether or not there is an adverse impact on the entire group of employees over forty, but also whether there is an impact on a *subgroup* of the protected class. Many have observed that this would create a statistical nightmare, as there are unlimited subgroups that could theoretically be analyzed for statistical disparity.¹⁷⁷ In fact, it could be impossible for an employer to completely analyze the situation through statistics.

¹⁷¹ Work Adjustment and Retraining Act, Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified at 29 U.S.C. §§ 2101-2109). WARN poses a problem for RIFs because the Act contains "complicated definitions and creates many potential traps." Dan Wilczek, *Key Steps for Employers in Effective Downsizing*, http://www.faegre.com/articles/article_1022.aspx (last visited Sept. 20, 2005). WARN requires notice for plant closings and major layoffs. *Id.* Adding to the legal confusion is the fact that courts have interpreted the law in various ways. *Id.*

¹⁷² Wilczek, *supra* note 171.

¹⁷³ See Allan G. King, *Statistics as a Guide to RIF Selections: Caveat Emptor*, 20 LABOR LAW. 79, 79 (2004).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 80. Courts will accept disparities that "are so great that a random process would produce them no more than five percent of the time." *Id.* at 79. Such disparities are considered statistically significant and generally considered to be probative in discrimination cases. *Id.* at 79-80.

¹⁷⁶ See *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) ("The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.").

¹⁷⁷ The ADEA operates to protect any individual over forty who was detrimentally affected by an employment action that favors a younger individual. *Id.* at 312. This result means that if a protected individual loses out to a younger individual because of age, *even*

Circuits that recognized the disparate impact theory prior to *Smith* had generally applied two standards of analysis to see if the RIF had an adverse impact on older workers.¹⁷⁸ The first standard was the four-fifths rule, which has been approved by the EEOC.¹⁷⁹ Under this rule, "an adverse impact is presumed to exist where the retention rate of older workers under an [involuntary reduction in force] is less than four-fifths, or 80 percent, of the retention rate of younger workers."¹⁸⁰ The other analysis used was a standard deviation analysis, in which the actual results are compared to a so-called expected result.¹⁸¹ Such statistical information can be important because federal provisions require employers to provide discharged employees in the protected age class with statistical information regarding the RIF after the employee's discharge.¹⁸² While statistical analysis provides only a rebuttable presumption of disparate impact, it does provide a sufficient basis upon which to base a claim. Thus, the statistical information can be enough to shift the burden back to the employer to prove that the RIF was based on a reasonable factor other than age.

But this is where the bulk of the problem lies. Statistical information is sufficient to get a disparate impact claim into court.¹⁸³ Courts have long since recognized that direct evidence of employment discrimination may not be available. In such cases, a plaintiff who can establish a *prima facie* case then shifts the burden to the defendant.¹⁸⁴ The requirements for the plaintiff's

if that younger individual is also in the protected class, the ADEA has still been violated. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004) ("[The ADEA] forbids discriminatory preference for the young over the old."). See also *O'Connor*, 517 U.S. at 312.

The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.

Id.

¹⁷⁸ As of this Note's publication date, no court has reconsidered the issue.

¹⁷⁹ Marcia K. Keegan, *United States: Important New Second Circuit ADEA Decision: Meacham v. Knolls Atomic Power Laboratory*, MONDAQ, Dec. 24, 2004, <http://www.mondaq.com/article.asp?articleid=30023&searchresults=1>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. §§ 621-34 (2000)).

¹⁸³ See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1544-45 (2005). See also *supra* notes 134-42 and accompanying text.

¹⁸⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

prima facie case were first laid out in race discrimination cases. Under this structure, known as the *McDonnell Douglas* formula, to make a prima facie case of discrimination, plaintiffs must prove the following: (1) the plaintiff is a member of the protected class, (2) the plaintiff applied and was qualified for the position for which the employer defendant was accepting applications, (3) the plaintiff was rejected, and (4) after the plaintiff's rejection, the position continued to remain open and the employer continued to accept applications from persons who were as qualified as the plaintiff.¹⁸⁵ All twelve circuits have since accepted the *McDonnell Douglas* formula, in some form, in ADEA cases as well.¹⁸⁶

RIF terminations are treated slightly differently than is an isolated discharge.¹⁸⁷ Under the ADEA, a prima facie case in a RIF action requires the plaintiff to show the following: (1) the plaintiff was a member of the protected group (here, age forty and over), (2) the plaintiff was meeting the employer's legitimate expectations, (3) the plaintiff was discharged, and (4) similarly situated, albeit younger, employees were not discharged.¹⁸⁸

If the plaintiff can establish the prima facie case, employer-defendants are then forced to defend the RIF in court. The use of statistics is a circumstantial method of proof that the employer intended to discriminate in the RIF. Statistics that open the door may be available in a wide variety of cases because so many factors, on which many RIFs are routinely based, are associated with age. Consider, for example, the correlation of age with pension, benefits, and salary. The high costs associated with these factors are often motivating forces in designing a RIF. While each of these factors is considered a reasonable factor other than age,¹⁸⁹ statistical data alone are sufficient information to begin a claim and force the employer to defend its

¹⁸⁵ *McDonnell Douglas*, 411 U.S. at 802 (footnote omitted).

¹⁸⁶ O'Meara, *supra* note 16, at 102.

¹⁸⁷ See generally Duane E. Thompson et al., *Age Discrimination in Reduction-in-Force: The Metamorphosis of McDonnell Douglas Continues*, 8 INDUS. REL. L.J. 46 (1996).

¹⁸⁸ *Townsend v. Weyerhaeuser Co.*, No. 04-C-563-Lg, 2005 U.S. Dist. LEXIS 11767, at *30 (W.D. Wis. June 13, 2005); *Cianci v. Pettibone Corp.*, 152 F.3d 723, 728 (7th Cir. 1998); see also *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493-94 (7th Cir. 2000).

¹⁸⁹ While it is true that pension, benefits, salary, and other factors are likely to be correlated with age, the Supreme Court has held that as long as, for example, pension is not merely a proxy for age, the employer may legitimately act on that factor. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) ("[The ADEA] requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify further characteristics that an employer must also ignore.") (emphasis in original).

action.¹⁹⁰ Such data are particularly the type of information that discharged employees could request because a RIF based on these considerations would indicate that the action had a disparate impact on older employees.

Thus, an employer, looking at statistical information that indicates that the planned RIF may have an adverse impact on older employees, may consider revising the RIF to avoid the possible legal challenge. However, employers may face additional problems in revising the RIF. The employees who traditionally have received the protections of the ADEA are older white males.¹⁹¹ In shifting the RIF to reduce the impact on workers protected by the ADEA, the RIF is likely to fall more harshly upon workers who have entered the workforce within the last twenty years.¹⁹² Among the fastest growing groups entering the workforce over the last few years are women

¹⁹⁰ Title VII disparate impact cases have made it very clear that statistical analysis is critical to a disparate impact claim. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). Many courts have made it clear that, under the ADEA, statistical evidence provided the basis for a disparate impact claim. See, e.g., *Caron v. Scott Paper Co.*, 834 F. Supp. 33, 39 (D. Me. 1993) (holding that the evidence showed statistical disparity that was substantive enough to raise the inference of causation; defendant's challenges of the statistical evidence merely indicated that there were genuine issues of material facts); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980) (holding that the trial court is in the position to fully assess the facts and circumstances surrounding the statistical evidence presented); *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir. 1995) (holding that the disparate impact claim was an appropriate vehicle for the introduction of statistical evidence and that statistical information is admissible and can prove a prima facie case under either the disparate impact or disparate treatment theory). *Contra Aylward v. Hyatt Corp.*, No. 03 C 6097, 2005 WL 1910904, at *14–15 (N.D. Ill. Aug. 5, 2005) (holding that plaintiffs failed to adequately support the disparate impact claim with relevant statistics from the RIF).

¹⁹¹ See O'Meara, *supra* note 16, at 24–29.

¹⁹² This effect is a result of the changing workforce. For example, the number of women employed in the workplace has more than doubled since 1970 (increasing from 29,688,000 employed women in 1970 to 63,582,000 employed women in 2002). BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CURRENT POPULATION SURVEY, *available at* <http://www.bls.gov/cps/wlf-tables2.pdf> (last visited Nov. 22, 2005). In comparison, the male workforce has only grown 1.5 times in size (from 48,990,000 employed males in 1970 to 72,903,000 employed males in 2002). *Id.* Other groups, such as the Hispanic population, have also grown significantly in the workplace. For example, in 1995, there were 11,127,000 employed Hispanic workers over age sixteen in the workforce. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CURRENT POPULATION SURVEY, *available at* <http://www.bls.gov/webapps/legacy/cpsatab3.htm> (under the subtitle "Hispanic or Latino Ethnicity," retrieve data for "Employed" and "Not seasonally adjusted") (last visited Nov. 22, 2005). By 2004, there were 17,930,000 employed Hispanic workers over age 16 in the workforce. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CURRENT POPULATION SURVEY, *available at* <http://www.bls.gov/cps/cpsaat4.pdf> (last visited Nov. 22, 2005).

and minorities.¹⁹³ Women and minorities have always been protected by Title VII and continue to have a disparate impact cause of action available in their legal arsenal.¹⁹⁴ Thus, an attempt to redesign a RIF in order to avoid an ADEA disparate impact claim may shift the burden to females and minorities, who then may have a legal cause for a Title VII disparate impact claim. This is consistent with the fact that the group provided the greatest protection by the ADEA is Caucasian, white-collar males.¹⁹⁵ Once again, the employer is forced to defend its actions in court.

This unfortunate reality is made more difficult by the fact that there are no official guidelines in place to help employers navigate a RIF.¹⁹⁶ Furthermore, the mechanics of such RIFs are often not addressed in personnel literature.¹⁹⁷ Because of the underlying problems and lack of guidelines, "virtually every organization undergoing a RIF is susceptible to complaints of age discrimination."¹⁹⁸

A decision in the Second Circuit fueled this growing fear. In *Meacham v. Knolls Atomic Power Laboratory*,¹⁹⁹ twenty-six former employees, all over age forty, challenged the involuntary RIF under the ADEA.²⁰⁰ In conducting the RIF, Knolls relied upon criteria such as "flexibility."²⁰¹ After creating the criteria and having managers rank the employees, the employer conducted a disparate impact analysis by analyzing the average age of the workplace both before and after the RIF; legal counsel also reviewed the RIF and spoke with

¹⁹³ See *supra* note 192.

¹⁹⁴ Women and minorities are protected under Title VII, and the Civil Rights Act of 1991 codified the availability of disparate impact causes of action under Title VII. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981 (2000)).

¹⁹⁵ See O'Meara, *supra* note 16, at 24-29.

¹⁹⁶ Peter H. Wingate et al., *Organizational Downsizing and Age Discrimination Litigation: The Influence of Personnel Practices and Statistical Evidence on Litigation Outcomes*, 27 LAW & HUM. BEHAV. 87, 88 (2003) ("Unlike selection, test construction, or validation situations, there are no uniform scientific or government sponsored guidelines to aid an organization in conducting a valid and fair RIF in a legally defensible manner.") (internal citations omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56 (2d Cir. 2004), *vacated and remanded*, *KAPL, Inc. v. Meacham*, 125 S. Ct. 1731 (2005) (The Court vacated and remanded in light of the decision in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005)).

²⁰⁰ *Knolls Atomic Power Lab.*, 381 F.3d at 61.

²⁰¹ *Id.* at 63.

some of the managers who created the rankings.²⁰² The court, in upholding the jury verdict for the plaintiffs, held that:

[I]f a particular criterion is subjective (as "flexibility" and "criticality" are), and if (as here) evidence shows that (i) the subjectivity disproportionately impacted older employees; (ii) the employer observed that the disproportion was gross and obvious; and (iii) the employer did nothing to audit or validate the results, then an employer may be liable for discrimination if equally effective alternatives to the challenged features of the employment practice are available.²⁰³

The employees were also awarded liquidated damages, as the court agreed that Knolls willfully violated the ADEA because the company failed to properly test the RIF for age discrimination.²⁰⁴ The company, according to the court, "should have compared the age composition of the pool from which the laid off employees were selected with the age composition of the group ultimately selected for layoff."²⁰⁵

After *Smith*, the Supreme Court, on writ of certiorari, vacated and remanded the opinion of the Second Circuit for reconsideration.²⁰⁶ However, still assuming, arguendo, that *Smith* allowed disparate impact claims without applying the *Wards Cove* standard, this decision would have significant implications for employers looking to conduct a RIF. Prior to implementing a RIF, employers will be well-advised to perform the following steps: (1) choose objective criteria, to the extent possible, and thoroughly define any subjective criteria that are necessary; (2) perform disparate impact analysis to look for any statistically significant differences in the number of persons affected who belong to a protected class and those who do not; (3) where a disparate impact exists, employers should review the RIF to ensure that the selection criteria did not create the discriminatory effect and also hold discussions with all of the managers who made decisions in creating the RIF.²⁰⁷ If nothing else, the decision made it clear that managers and human resource managers are well-advised to seek legal advice and training in what constitutes a proper RIF.

Thus, the allowance of disparate impact claims under the ADEA could have served to increase the number of lawsuits employers are forced to

²⁰² *Id.* at 64-65.

²⁰³ *Id.* at 75.

²⁰⁴ Keegan, *supra* note 179.

²⁰⁵ *Id.*

²⁰⁶ KAPL, Inc. v. Meacham, 125 S. Ct. 1731 (2005).

²⁰⁷ Keegan, *supra* note 179.

defend. While not all of the cases would necessarily be meritorious, employers would still need to spend valuable resources to defend the claims. Employers would be well-advised to either get the claims dismissed or settle out of court—age discrimination plaintiffs have traditionally fared better in front of juries than other discrimination plaintiffs.²⁰⁸ In this manner, opening the courts to ADEA disparate impact claims without the *Wards Cove* standard would have increased the amount of employment litigation in the courts and required employers to spend greater amounts of time and money defending or settling lawsuits.

Fortunately for employers, the application of the *Wards Cove* standard may save employers from some of the troubles arising from reductions in force. In *Wards Cove*, cannery workers brought a disparate impact claim, alleging that they were treated unfairly on the basis of race.²⁰⁹ The statistics showed that there were more minority workers in the cannery positions than in the non-cannery positions.²¹⁰ Although the circuit court held that this statistical evidence established a prima facie case, the Supreme Court held that “a comparison between the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite [does not] make[] out a prima facie case of disparate impact.”²¹¹

Although the Court remanded to reconsider a prima facie case based on statistical evidence, the remainder of the opinion is equally important.²¹² The Court reaffirmed that the disparate impact plaintiff’s

burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer’s work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.²¹³

²⁰⁸ See Wilczek, *supra* note 171 (describing two large settlements of 2002—Gulfstream Aerospace’s agreement to pay \$2.1 million to sixty-one employees over the age of forty; Footlocker’s \$3.1 million settlement to quiet claims that it purposefully replaced older workers with younger workers).

²⁰⁹ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 647–48 (1989).

²¹⁰ See *id.* at 650 n.5.

²¹¹ *Id.* at 655.

²¹² See *id.*

²¹³ *Id.* at 656 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).

Thus, under the ADEA, disparate impact plaintiffs must establish a *specific employment practice* that is being challenged.²¹⁴ As the Court noticed, holding otherwise would allow employers to be held liable for “the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.”²¹⁵ ADEA disparate impact plaintiffs in RIF cases, therefore, will bear the ultimate burden of persuasion and must establish a *prima facie* case indicating both relevant statistics and a specific employment practice, and not a general effect, that resulted in the disparate impact.²¹⁶ As more than sheer statistical information is required, plaintiffs cannot simply rely on the required disclosures.²¹⁷ For example, plaintiffs cannot simply allege that older workers were disparately impacted due to greater cost savings, as the plaintiffs have not alleged a specific employment practice.²¹⁸

This is not to say that such claims will be impossible to bring. Plaintiffs may still be able to create a *prima facie* case and meet the initial burden. However, *Wards Cove* also made it easier for employers to defend disparate impact cases.²¹⁹ Employers need only prove that “a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”²²⁰ As at least one district court has noted in the wake of *Smith*: “[A]n employer that decides to terminate an employee to relieve itself of the burden of that employee’s high salary or health care costs has based its decision on ‘reasonable factors’ other than the employee’s age.”²²¹ Thus, the Court’s specific reference to *Wards Cove*, establishing that defendants in disparate impact cases need only point to a reasonable business justification, should reduce the burden on employers. The Court in *Smith* specifically noted that employers should not be liable for the “myriad of innocent causes

²¹⁴ See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1545 (2005); see also *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2005 WL 1801605, at *2 (D. Kan. July 29, 2005) (holding that plaintiffs need not point to a specific part of the “alpha rating system” in order to allege a disparate impact claim but that the alpha rating system was a specific employment practice that could be challenged); *Durante v. Qualcomm, Inc.*, No. 03-56255, 2005 WL 1799416, at *2-3 (9th Cir. Aug. 1, 2005) (holding that the plaintiffs failed to point to a specific employment practice using solely subjective criteria in challenging the RIF).

²¹⁵ *Fort Worth Bank & Trust*, 487 U.S. at 992.

²¹⁶ See *Smith*, 125 S. Ct. at 1545.

²¹⁷ See *supra* note 182 and accompanying text.

²¹⁸ See *Townsend v. Weyerhaeuser Co.*, No. 04-C-563-Lg, 2005 U.S. Dist. LEXIS 11767, at *39 (W.D. Wis. June 13, 2005).

²¹⁹ See *supra* note 56.

²²⁰ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

²²¹ *Townsend*, 2005 U.S. Dist. LEXIS 11767, at *40.

that may lead to statistical imbalances.”²²² The increased burden on plaintiffs and the relatively easy standard for defendants combine to make disparate impact cases difficult to bring, particularly in the context of reductions in force.²²³ If a claim is brought, many employers will succeed at the summary judgment stage, thus eliminating the need for a trial and/or settlement offer. Because summary judgment can eliminate many of the costs associated with litigation, employers should not be facing increased litigation costs. Further, employers need not be so fearful of ADEA disparate impact cases and therefore attempt to shift any impact to other groups—including women and minorities. In fact, given that the *Wards Cove* standard applies only to ADEA plaintiffs and that Title VII plaintiffs are generally afforded more protections, employers will find it against their interests to attempt to shift any of the impact of the RIF to these other groups.

IV. CONCLUSION

It was clear that, regardless of what the Court decided, *Smith v. City of Jackson* would reshape the employment law landscape. In particular, if the Court had recognized the cause of action and not applied the *Wards Cove* standard, employers could suddenly have been open to many new claims, including the relatively new claim of a hostile work environment based on age discrimination. If employers are forced into court or into settlements, more of their resources will be diverted from the actual workforce. Thus, continuing lawsuits may only increase the number or severity of RIFs that employers will implement over the coming years.

Thus, the Court was well-advised to decide in favor of the employer in *Smith*. Although the disparate impact cause of action under the ADEA was recognized, the application of the *Wards Cove* standard should serve to limit the threat of litigation facing employers. While the ADEA and Title VII have been construed to have similar provisions, the ADEA must one day separate itself from Title VII. As the ADEA does not expansively recognize disparate impact claims, and, by extension, hostile work environment claims, the statute is finally on its way to standing on its own without continued support from Title VII. In the end, the differences between race and age, noted both by the Court²²⁴ and by commentators,²²⁵ should begin to distinguish between

²²² *Smith v. City of Jackson*, 125 S. Ct. 1536, 1545 (2005).

²²³ At least one district court has already ruled against a plaintiff in a disparate impact reduction in force case, relying on the *Smith* decision. See *Townsend*, 2005 U.S. Dist. LEXIS 11767, at *37–41.

²²⁴ See *Cline v. Gen. Dynamics Land Sys., Inc.*, 540 U.S. 581, 597–98 (2004).

²²⁵ See Reaves, *supra* note 122, at 158.

the two discrimination statutes. While it may be easy for Title VII and the ADEA to be interpreted similarly, and indeed the shared language may require reference to the other statute at times, the ADEA will only fully develop when it has an independent line of jurisprudence free from the impact of Title VII. The *Smith v. City of Jackson* decision may very well serve as the ADEA's first step on its own.